IN THE

Supreme Court of the United States

OCTOBER TERM, 1927

NO. 219.

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the will of Glenn T. Braden, Deceased.

NO. 220.

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania, Petitioner,

v.

THE COLONIAL TRUST COMPANY, Executor of the will of Glenn T. Braden, Deceased.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

Opinions of Courts Below.

The decision herein by the District Court is reported in 12 F. (2d) 481 and by the Circuit Court of Appeals in 17 F. (2d) 36 and is,—

That the United States has never for its own

benefit taxed its Indian wards;

That for the Government to announce taxation of a Tribe's prospective lessee of restricted Indian mineral land on his share of the mineral, at the very time that as Guardian on behalf of the Indians it is negotiating with him for the lease, would only be to reduce the royalty otherwise obtainable for them and would be in reality to tax the Indian; and

That an intent by Congress to do this in the general Revenue Acts is not to be imputed by implication—Indians always being dealt with specially—their dependency on the Government, the fiduciary relationship, and Osage status as a Tribe alike forbidding the implication.

Jurisdiction.

The judgments to be reviewed were rendered on January 11, 1927 (R. 52, 53). Petitions on behalf of the Government for writs of certiorari were filed April 8, 1927 invoking the jurisdiction of this Court pursuant to Section 240, Judicial Code, as amended by the Act of February 13, 1925. The writs were granted May 16, 1927 (R. 53).

Counter-Statement of Case.

These cases arose on statutory demurrer, presenting the following as matter of admission (R. top and ft. 14; 6 Pur. Dig., Pa., 13th Ed. 7138, pl. 25; *Davis v. Edmondson*, 261 Pa. ft. 199, 204),—

1.

The National Government is Guardian of the Osage Indians, who are still in tribal status and as such constitute a dependent people.

The oil deposits in the lands which the Tribe owns and occupies in Osage County, Oklahoma, are the exclusive property of the Tribe in its capacity as Tribe or Nation.

By special federal enactments, these Osage oil deposits are, and always have been, inalienable in any form, subject to no form of incumbrance, and *held by the United States in trust for the Tribe as wards of the Government,* the United States having assumed, and continuing to assume, the duty of protecting this tribal property against all forms of alienation and incumbrance.

(R. 2 to 5)

2.

Prior to 1917 and until his death on September 23, 1923, Glenn T. Braden (respondent's decedent) was lessee in respect of these oil deposits under a lease from the Osage Tribe of Indians.

The lease was negotiated on behalf of the Indians by the United States as their Guardian, and in so doing the National Government was admittedly under a duty to make the best terms that it could for the Osages.

The ensuing royalty payable—and paid—by Braden under this lease to the Osage Indian Agency for the Tribe

(lessor) was greatly in excess of the royalty customarily paid by lessees under the commercial leases in the same (mid-continent) field.

(R. 5, 6)

3.

Against payment in taxes on his profits from this lease Braden personally protested to the Collectors and paid under duress and threat of distraint and sale of his property (R. mid. 9, 10, 11, and R. 43, item 10). Braden also promptly filed and duly pressed his claim for refund therefor. (Statement of Claim, Para. 17, and Exh. A, of the earlier-period, or Lewellyn, case, also Stipulation therein, on the Government's request not printed on writ of error, as per R. 47, 48, but now certified to this Court on respondent's petition to the District Court as hereinafter set forth).

As to the balance of the taxes, which were paid after Braden's death, his Executors did likewise, these suits being promptly brought after the prerequisite of Bureau denial of refund (R. 9-12, 17).

Lewellyn (defendant at No. 3271 in the District Court) was Collector during the period expiring Aug. 1, 1921,—Heiner (defendant at No. 3272) on and after that date. (R. 2).

4.

The District Court, holding that the Collectors had exacted these taxes without authority of law, ordered their return (R. 47). The taxes totaled $822,346.20, as correctly stated in the petition for certiorari. This amount is the sum of the $469,354.68 collected by Lewellyn and the

$352,991.52 collected by Heiner. Adding interest to the last named figure gives the $411,127.07 to which the Government in its present Brief now confines itself.

The District Court's judgments against the Collectors for these taxes and their interest, the Circuit Court of Appeals affirmed (R. 52, 53), the latter court's opinion being written in the later-period, or Heiner, case, in which the record was printed (R. 50, 51).

5.

The reason for the non-printing of the Lewellyn record, at the Government's instance in connection with its writs of error out of the Circuit Court of Appeals, was because of the two cases involving the same legal question, as well as because the "material" portions of the record in each case "are the same." (R. 47, 48.)

However, as the Government's Brief, twice, inadvertently states that claim was not made until 1924 (as was appropriately the case in the Heiner, or later, suit), we have had the presiding judge of the District Court under Rule 9, Sec. 3, certify to this Court the Statement of Claim and the Stipulation in the Lewellyn suit. They show as "true" that Braden himself, who died on Sept. 23, 1923, had duly filed *"his duly signed and sworn-to claim for refund"* of income taxes for the taxable year 1918 paid by Braden to Lewellyn in 1919, these taxes being the earliest payments embraced by the judgments herein.

Also, the District Court, in an opinion expressly applicable to both the Lewellyn and Heiner cases, found that,—

"Upon threat of the respective collectors to enforce

payment of the taxes assessed, with penalties and interest, by distraint and sale of his property, *Braden* paid the taxes set forth in the statements of claim *under protest,* no part of which has been refunded." (R. 43.)

Finally, as to the matter of Braden's inclusion of his income from this lease in his returns to the Government, on its forms, this was at the "demand" and by the "requirement" of the Treasury, its levy and assessment thereon against him for the very first year being "over his due objection." (R. ft. 9; 10 to 13.)*

As indicated, the judgments herein are predicated of the following,—

(a) That Congress has not taxed its Indian wards, (b) which to tax their mineral lessee would be to do:

---

*These cases were not tried—there was nothing to try—they were argued and disposed of on demurrer, the stipulations serving as voluntary Amendments. Those stipulations came about at the Government's suggestion and were prompted by the prospect and intention on its part (duly carried out) of demurring to our Statements of Claim after the stipulations had supplied the facts wanted by the Government.

The consideration tendered by the Government and accepted by the executor for the latter's consenting to the stipulations so as to make it satisfactory to the Government to demur, was the latter's assurance that, if its demurrers were overruled, there was no defense on the facts. Hence arose the portion of the stipulations as to the truth of the other facts alleged in the statements whereon the executor's right to recover rested.

ARGUMENT.

This case is one of statutory construction.

The question is whether under the general federal Revenue Acts the income of an Indian Tribe's lessee arising from a lease of the Indians' oil deposits, negotiated by the Government as the Indians' Guardian, is subject to tax.

The question presents itself in respect of the negotiations for the lease. The matter is one of the announcement of taxation of the lessee as affecting terms for the Indian owners.

The negotiations for the lease on behalf of the Indians are conducted by the Federal Government as the Indians' Guardian. The prospective lessee as well as lessor, and the lessor's agent or Guardian, must deal in the light of the burdens and profits to which the lease will give rise. No measure of burden or profit can be made without considering the presence or absence of taxation.

It is thus all a matter as to what, in this view, the Congress of the United States *meant by its taxing Acts*:

Our proposition is that,—

(a) By its general Revenue Acts, the United States has not for its own pecuniary advantage taxed a dependent Indian Tribe, who are its wards, on their trust estate restricted by prior special federal enactment; and

(b) For the United States, in negotiation as Guardian on behalf of the Indians with their oil lessee, itself to promulgate taxation of the lessee's share of the probable production would at once reduce the royalty he would otherwise be willing to agree to pay the Indians and would be in substance and effect for the Guardian by this means to tax the wards for its own benefit:

ONE.

I.

Taxing the lessee of restricted Indian mineral land on his share of the production is direct in its effect on the Indian lessors and to do this would be in substance to tax the Indians on their royalty.

Gillespie v. Oklahoma, 257 U. S. 501:

Braden and Gillespie sustained precisely the same relation to the Osage Tribe of Indians (lessor of one and the same oil deposits) and to the United States as the Indians' Guardian, and under substantially identical leases, and each was subjected by Collectors to the same *kind* of taxation.

Gillespie was a citizen of Oklahoma and a white man. Oklahoma laid an income tax on entire net income arising from all sources, and sought to hold her citizen Gillespie liable on income derived by him as lessee of restricted Osage Indian tribal oil lands from his sales of his share of the oil he extracted therefrom,—so far as these Indians' proprietary interests were involved, exactly our case and as petitioners put it.

Just as Braden had in hand income from oil produced by him from Osage Indian land, so had Gillespie identical sort of income as like lessee of the same tribal lessor from the same land.

The Supreme Court of Oklahoma upheld taxing Gillespie's income as such lessee.

Gillespie having taken his case to this Court, the Supreme Court of Oklahoma was reversed and it was adjudged that Gillespie was not liable to pay taxes to his own State on income derived as lessee of Osage Indian oil lands.

Obviously, this intervention between a State and her citizen was out of no regard for Gillespie but solely for the Indians' sake.

Why was it, that it made a difference to them, that a non-Indian lessee of their mineral lands had to pay taxes on his income from their lease to him?

This Court's reasoning starts with the fact that Gillespie—so also Braden—"was an instrumentality used by the United States in carrying out *duties to the Indians* that it had assumed," the question being "whether he is liable to this *kind* of tax," (italics ours), (p. 504).

The test being "the effect of the tax" (*Railroad Co. v. Peniston,* 18 Wall. 5, 36), and the question of lessee-tax-liability arising in light of the lessee being a federal instrumentality to carry out guardian duties to Indian wards, what duties in the premises did the Guardian owe these Osage wards beyond seeing that they got full value for their oil rights?

The Indians had no machinery and no ability themselves to produce their oil or to market it. The Guardian

did not want to go into the oil business. Therefore it was, and therefore only, that resort was had to Gillespie, who did have the machinery, labor, and experience to find the oil, to get it out of the ground, and to turn it into money. The Indians' only interest in the transaction was *the royalty it would produce.* In so far, then, as their lessee was pertinently "an instrumentality"—as he was—to carry out fiduciary duty, *it was as producer of Indian royalty.*

Here was the very place the Attorney General for Oklahoma (unsuccessfully) fought. At the outstart of his Brief in this Court (p. 4 thereof), he declared that Oklahoma urged the validity of that income tax on profits of a lessee of Osage tribal oil lands on the ground that taxation of the lessee on his share of the oil, "is *not* a tax upon property of the *Indian*",—the very position now advanced by the Federal Bureau of Internal Revenue in the cases at bar.

These tribal leases, however, being under the National Government's *protection* as Indian Guardian (*Indian Territory Illuminating Oil Company v. Oklahoma,* 240 U. S. 522, 529), and Gillespie an instrumentality used by the United States *to carry out its duties to the Osages,* and taxing affecting terms (*Weston v. Charleston,* 2 Pet. 449, 468, *supra*),—

> "a tax upon such profits (of the Indians' lessee from his leases) is a direct hamper" upon the Guardian's effort "to make the best terms that it can for its wards." (p. 506).

And the judgment of the Supreme Court of Oklahoma was accordingly reversed.

The Gillespie case dealt with a non-Indian operating lessee of Osage tribal oil lands and with a tax on his in-

come derived from his sale of the oil he extracted therefrom; and

The fundamental issue was whether such a tax on the Tribe's lessee was direct or remote as affecting the Tribe in respect of these same oil deposits and these Indians' royalties therefrom.

Just as with the coal (p. 14, *infra*), the real nature and effect of the tax was seen to be in respect of the negotiations for the lease (p. 506).

If the invalidity of taxing Gillespie's oil income, as Osage Indian lessee, had not been because the real effect of such taxation was directly to tax the Indians by abating the royalty otherwise obtainable for them in the negotiations for the lease, wherein—would petitioners suggest—was it germane in the Gillespie case to distinguish the *Gay case* as "obviously" more *remote,* adjudge such tax on lessee a "direct" hamper on "terms", cite *Weston v. Charleston,* or stay Oklahoma's hand on her citizen's income from his sale of the oil?

True, with Gillespie, the question arose in a case of State taxation:

But taxation, direct in effect on "terms" for Osages when imposed by a State, would be no less direct if federally imposed. To a bargaining lessee, it makes no difference *who* lays the tax. Since Oklahoma's enactment of taxation of operators' oil income injuriously affected the amount of Indian royalty, the United States' like taxing would have precisely the same inexorable economic effect.

It was not just because it was *Oklahoma* that was doing the taxing of profits of Indian mineral lessees—it was

because of what was being *done*—it was the effect on the negotiations for the Indians of this *kind* of taxation of their lessees *in the light of the obligations of the guardianship.*

In this very regard, *Gillespie v. Oklahoma* was followed in *Jaybird Mining Company v. Weir,* 271 U. S. 609, 613, 614, and 615, where, on the authority of the former and its related cases, the opposing view that payment of taxes on restricted Indian ore mined by a lessee "will not affect the financial return to the Indian under the lease" was again rejected.

How is it an answer, then, for petitioners to urge that what a State may not do touching a federal instrumentality, Congress has *power* to do? Congress' power is not in controversy, but its intention in the light of its *duty.*

At that, strictly speaking, it was *not* a matter of power in Oklahoma to tax, but of lack of federal consent to State exercise of power. *Jaybird Mining Company v. Weir,* 271 U. S. 609, 613, *supra; Childers v. Beaver,* 270 U. S. 555, 559.

In *Metcalf v. Mitchell,* 269 U. S. 514, 519, 522, (petitioners' Brief, p. 10) the effect, on the State there, of that consulting engineer's being within the purview of the federal Acts was adjudged *remote* and in *avowed contrast* to the Gillespie and related Oklahoma Indian tax cases, *supra,* whereas *ours is the Gillespie case,* except only that the taxor here is the very Guardian.

The Oklahoma Indian Coal-tax Case:

In *Missouri K. & T. Ry. Co. v. Meyer,* 204 Fed. 140, Judge Cotteral's conclusion against the validity of that Oklahoma coal-tax proved to be in accord with this Court's

conclusion with reference to the same legislation (pp. 13-14, *infra*). The attempted taxation there was on receipts from coal which a Tribe's lessee had mined from restricted Indian mineral lands. Judge Cotteral (ft. 145) held that the question as to the *directness* of that tax-on-receipts should be tested by its effect upon the Indians' leases. He pointed out that, if sustained, it might be extended to the limit of depriving the leases of all value to the Indians.

That particular tax, when it came to being *collected,* was, of course, against the pecuniary receipts of a particular lessee from his *sales* of the coal, just as Braden's (and Gillespie's, *supra*) was from sale of oil. The question of directness of bearing of coal-tax, however, was "upon the leases", upon the anterior real estate transaction of leasing (top p. 146).

This Court's consideration of the same taxation was in *Choctaw, etc., Railroad Co. v. Harrison,* 235 U. S. 292. The leases had been negotiated by the United States as the Guardian of the Choctaw and Chicasaw Indians in discharge of the *duty* owed those dependent Indians in respect to the opening and operating of their coal deposits, and provided for a rent, or royalty, for them based on the production of coal.

The federal court below there, as well as the Supreme Court of Oklahoma in *Coal Co. v. Trapp,* 38 Okla. 792, 794 —the reasoning and conclusions of both of which were rejected (235 U. S. at 298)—had viewed the tax narrowly, as though a tax on personalty, as if the incidence of the tax were on the proceeds of the coal after being mined and hence as something remote as related to the Indians. This Court, however, approving Judge Cotteral's view that that tax was not on the coal as personalty *but was against the leases and thus in reality a direct tax on the*

Indians on their royalty from their coal lands, struck the tax down with the declaration that giving a tax a particular name or using some form of words could not take away this Court's duty "to consider its real nature and effect". (nr. ft. 298 of 235 U. S.)

So also at bar, the real nature and effect of taxing the income of the Osages' oil lessees would be equally direct on the Indians, upon their oil royalties. Braden, as the Osages' lessee, is, concededly, a federal instrumentality used by the United States in carrying out the duties which as Guardian it assumed toward this dependent Tribe. Concededly, his lease is under the Guardian's protection.

By way of illustration, from among the Oklahoma Indian tax cases, *supra*—

An Indian oil-lease is being negotiated.

The Indian lessors—incapable, legally as well as practically, of dealing for themselves—take no part in the negotiations. Trusting to its protection and good faith and relying on its power, they depend wholly on their Guardian to make for them the best terms that it can with their non-Indian lessee,—peradventure, Gillespie of Oklahoma, or Braden of Sewickley.

Oklahoma interrupts by announcing intention to take in taxes part of the prospective lessee's share of any oil he may be able to produce. This, the Guardian at once vetoes as directly interfering with its duty to get the Indians full royalty, and Oklahoma withdraws defeated.

Motive, duty—instigation thereto, direct effect, on Indians' return from their mineral lands, of taxing their lessee:

II.

What, on the score of duty to its dependent Wards, the Guardian would not let Oklahoma do, it has not itself done.

The Guardian's duty has not changed. The reason constraining the fiduciary to stay Oklahoma's hand is still as compelling. Has the United States itself done as against its dependent wards what on the score of its duty to them it would not suffer Oklahoma to do? Reason for invalidating state taxation of operators' oil income because inevitably affecting Indian wards' royalty is just as potent a reason why the United States as Guardian has not turned around and *done the very same thing itself.*

As the Attorney General said, of the Gillespie and sister cases—referring to the Indians,—

> "If a state can not tax them, the question arises, is it proper or legal for the Federal Government to tax them? Is it consistent for it to guard this income from the State taxing power and surrender it to congressional authority? Would such procedure be consistent with its policy toward the Indian as protector and conservator?"
>
> 34 Op. Atty. Gen. 275, 285.

Or, as the District Court said,—

> "As the exercise of taxing power by Oklahoma might destroy the value of the lands to the Indians, so, probably, the exercise of like taxing power by the Government would have such destructive effect. Braden, the decedent in this case, is not taxed, not because the United States was without power to tax him but because in the discharge of its obligation as

guardian it has refused to exercise such power to the manifest detriment of its wards." (R. 47).

It is no part of a Government's policy for its own purposes to tax its own land or its own instrumentalities. 37 Cyc. 865; *Mercantile Bank v. New York,* 121 U. S. 138, 162. Here, the land is held *in trust.* The lessee's utility as instrumentality is *in carrying out a fiduciary duty.* His lease is under the Government's protection, the United States in the negotiation thereof being under obligation to take care of its lessor wards (257 U. S. 501; 240 U. S. 522, *supra.*)

Were there doubt, as it seems to us there can be none, the Guardian would resolve it against itself. This trust is a public use in the highest sense, *U. S. v. Nashville etc. Ry. Co.,* 118 U. S. 120, 126.

As said in *Choate v. Trapp,* 224 U. S. 665, 675,—

"The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the Nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied *in tax cases.*" (p. 675). (Italics ours).

Without break, the decisions attribute to the United States the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, *United States v. Candelaria,* 271 U. S. 432, 439.

III.

On principle and in practice, a tax-free lessee pays more rent.

1.

Taxing—as said by Chief Justice Marshall in *Weston v. Charleston,* 2 Pet. 449, 468,—"must" affect "terms."

Under the Texas Constitution taxation of school lands is forbidden. Accordingly it was held that to tax lessees thereof "would but diminish the rental value of such lands", such that it was not reasonable to suppose this was intended. *Daugherty v. Thompson,* 71 Texas 192, 202.

All lands, houses, or revenues of Harvard College not exceeding five hundred pounds per annum being free from taxation, they were equally so in the hands of its lessee. *Hardy v. Waltham,* 7 Pick. 108.

When landlords get the tenant to agree to pay the taxes, while they find this convenient, they are under no delusion that the tenant is *really* paying the taxes:

"The reasoning is simple", as Seligman says. "At any given time, when the tenant makes out his lease, he makes allowance for the taxes which are collected from him. The rent which he is willing to give will vary with the tax which he is compelled to pay. * * * *The burden hence falls wholly on the landlord."* (Italics ours). *Shifting and Incidence of Taxation,* 3 Ed., 271, 272.

As to the negotiation of leases of minerals, such as *oil,*—

2.

The essential problem between prospective lessor and lessee is as to the *division* of the hoped-for production.

While the presence of oil and the possibility of striking it give value to land far beyond any agricultural or surface value, the owner does not ordinarily have the means to finance the operation. Even on proven ground, the venture is speculative, and costly. In practice, accordingly, the situation is dealt with on the footing of a lease of the land with a rent, or royalty, based on a *sharing* of the production.

Anything which increases the hazard or expense to the operator makes him the less desirous of entering upon the enterprise. A tax against his prospective profits could be made heavy enough to deter him from making a lease at all.

Thus, as matter of common knowledge, as well as of authoritative pronouncement, the principle that a tax on lessee is shifted to lessor by being taken out of the latter's rent in advance is *a fortiori* true in leasing land for oil.

If, then, during the negotiations to lease Indian oil lands, a governmental authority announce an intention to take in taxes a share of the still prospective production for *itself*—in addition to the share for the Indians—it at once reduces what the lessee could otherwise agree to render the Tribe.

As said in *Gillespie v. Oklahoma* (*supra,* p. 10), stopping short of theoretical possibilities, the hamper of such a tax is "direct", and *that,* in its economic effect as to "terms"; and

In oil-lease negotiations, "terms" for landlord is *royalty.*

3.

Actual Alaskan and Osage Indian Royalties:

How highly "practical" it is for Indians to have a tax-free lessee, is seen in the case of Alaskan Indians. In the negotiations on their behalf, the Secretary of the Interior obtained an *agreement,* that if the lessee were adjudged not subject to that territorial license tax, it "should pay an amount *equal to the tax* to the lessor"! *Territory v. Annette Island Packing Company,* 6 Alaska 585, 589.

Neither, is it, as petitioners argue now, (their Brief, p. 9), "altogether theoretical and not practical" in the case of the *Osages.* These Indians do receive greater royalty because of the non-taxing of their lessees of their mineral lands, *their leases paying a much higher return* for more limited rights than the ordinary commercial lease in the same (mid-continent) field (p. 4 *supra*; R. 6), just as the authorities envisage.

Attention is invited to the striking comparison between the terms of the Osages' lease and those of the commercial lease as tabulated in parallel columns at pp. 6 and 7 of the Record. For the high Osage royalty (of from 33⅓% to more than 50% excess over the commercial lease) no reason save tax freedom of the lessee has ever been suggested or is apparent. While the Secretary "prescribes" and "approves" it, this high royalty did not drop from the clouds, it is the fruit of untaxed experience. Nor is it to

be forgotten that it is not enough for the Secretary to "prescribe", he has to get his lease *signed.**

The high royalty, then, as well as Braden's protest to the Collectors against payment of taxes on his income as Osage oil lessee (R. 43) and his own personal filing of claim for refund against Lewellyn (pp. 4, 5, 6, *supra*), equally confute petitioners' irrelevant supposition as to what Braden *thought,* when negotiating, as to income tax liability, or the circumstance that under Treasury requirement this income was included in his returns,—even were the question—as, of course, it is not—one as to the mental attitude of a particular lessee instead of the meaning of Acts of Congress as related to federal negotiation of any mineral lease of dependent Indians to any lessee of theirs.

In the cases at bar, then, the courts below were actuated not only by *a priori* considerations but also by *stare decisis.* It is submitted, they were right, that the principle that so justly ruled the Choctaw and Gillespie cases rules ours.

Petitioners content themselves with the familiar assertion that "This tax is not on the Indians, their property, or income. It is on the income of those dealing with the Indians." (Petitioners' Brief, p. 9):

Petitioners confound the collection of the tax with its incidence.

The argument did not prevail in the Choctaw, Gillespie, or Jaybird cases. Wherein do petitioners suggest that

---

**In the Stipulations,* petitioners insisted the facts herein were "immaterial" (R. tp. p. 17). They are averred,—and not denied, in Affidavit of Defense or Stipulation.

the argument is any sounder now? Taxing the Indians' lessee on the coal and oil and ore taxed the Indian before. Why not still? Petitioners suggest no answer. We know of none. The proposition, it seems to us, is both patently sound and *stare decisis*.

It may perhaps be remarked, that, to the foregoing and to all the authorities above cited, petitioners' attention has been already repeatedly invited both in this Court and in the courts below.

To tax prospective oil lessee being thus in reality to tax Indian lessor, it is submitted that the courts below were also right (R. 46, 47; 51), that, by these general Revenue Acts,—

IV.

Congress has not taxed the Wards for the benefit of the Guardian.

Absence of intent by the National Government for its own benefit in anywise to tax the members of the Osage Tribe of Indians on their mineral deposits arises, it is submitted,—

(a) from the fiduciary obligations growing out of the relationship of Guardian to ward assumed by the United States toward a dependent *people* in respect of the wards' trust estate; (b) from these, the Osages' *specially* restricted tribal mineral deposits being, admittedly, "inalienable in any form" and under Guardian protection against alienation in all forms (R. 4); and (c) from the Government's long and unbroken policy not to tax its Indian wards; and

(d) is manifested in the Revenue Acts from their being *general* statutes without mention of Indian wards or trust estate, Acts whose *purview* therefore does not embrace members of a Tribe in respect of their *specially* restricted lands:

1.

The Osage Tribe is a Nation, *Cherokee Nation v. Georgia,* 5 Pet. 1, 17, a people, *Choate v. Trapp,* 224 U. S. 665, 675.

This Osage Nation, the United States received "under their protection," the Osages acknowledging dependency, 2 *Kappler's Laws & Treaties* (2 Ed.), pp. 97, 880; R. ft. 3,—the Government assuming the duty to protect the Tribe's mineral deposits and holding them in trust (R. 4).

As said by Chief Justice Marshall in 5 Pet. 1, 17, *supra,*—

> The Indians are wards and *depend* on the Guardian, "look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father."

From this accepted dependency, the guardianship arises. *Winton v. Amos,* 255 U. S. 373, 392.

The Osages are still wards. *La Motte v. United States,* 254 U. S. 570, 575; *United States v. Ramsey,* 271 U. S. 467, 469; R. 3, 4.

2.

How pertinent the Attorney General's reasoning:

On Mar. 20, 1925, at the request of the Secretary of the Interior, the Attorney General examined the question whether, during the restricted period, income of individual *Quapaw* Indians from their mineral royalties (*inter alia*) from their restricted lands had been taxed by these same general Revenue Acts. In an opinion, approved Sep. 15, 1925, by the Secretary of the Treasury, the Attorney General held that—*no reference being made therein to Indian wards or their property*—such income is not *within the purview* of the Acts,—this because of the fiduciary relationship of the Government toward the Indians, as well as by reason of the "inalienability" of their lands from which their income came.

As in the case of the Osages, there was nothing in the treaties or Acts of Congress with respect to the Quapaws in so many words saying that Quapaw mineral lands should be free from taxation. There, as here, the word used was "inalienability". (R. 4, 16, 46.)

The Attorney General—in view of the Government's policy toward the Indians as a dependent people, their being the original proprietors of the land, the fiduciary relationship, and the principle of construction that Indians are favored—said,—

> "True, the Federal Income Tax Statutes are in broad compass and impose a tax upon the entire net income of 'every individual.' Section 1 (a), Revenue Act of 1916, 39 Stat. 756; Section 210, Revenue Act of 1918, 40 Stat. 1057; Section 210, Revenue Act of 1921, 42 Stat. 227; Section 210, Revenue Act of 1924, 43 Stat. 253. *No specific reference, however, is made in*

these Acts to Indians and their property. We have seen that none of the treaties or statutes dealing with the Quapaw Indians contains any provision subjecting their lands to State or Federal taxation. On the contrary, by the Quapaw Allotment Act Congress, instead of providing a way to compel the Indians to contribute out of their property to the support of the Federal Government, immediately concerned itself with a provision of law securing to them the continued possession and enjoyment of their lands by making the same inalienable. In order to make this restriction against alienation properly effective, it would seem that *inalienability and nontaxability* should go hand in hand, at least until Congress clearly provides otherwise. At any rate, I am unable, *by implication,* to impute to Congress under the broad language of our Internal Revenue Acts an intent to impose a tax for the benefit of the Federal Government on income derived from the restricted property of these wards of the nation; property the management and control of which rest largely in the hands of officers of the Government charged by law with the responsibility and duty of protecting the interests and welfare of these dependent people. In other words, *it is not lightly to be assumed that Congress intended to tax the ward for the benefit of the guardian.*

"Therefore, in the absence of clear congressional authority to that effect, I am of opinion that the income from the restricted lands of the Quapaw Indians is *not subject* to the Federal Income Tax Laws.

"The opinion of the Attorney General of March 15, 1924, relative to the taxability of the Five Civilized Tribes, is largely applicable to the question here presented." (Italics ours.) 34 Op. Atty. Gen. 439, 445.

"Quapaw" in the above quotation could just as well

read "Osage," save that the Quapaw restricted period expired in 1921, Osage still running till 1946 (R. 5).

That alienation may be involuntary, and that Indian inalienability connotes Indian freedom from taxation, is well established. *Kansas Indians,* 5 Wall. 737, 760; *United States v. Bean,* (Judge Sanborn C. C. A. 8th Cir.), 253 Fed. 1; 19 Op. Atty. Gen. 161, 168, and authorities there cited. Judge Cotteral so views these very minerals, 193 Fed. nr. tp. p. 492. The legal title thereto is in the United States. *McCurdy v. United States,* 264 U. S. 484, 486.

Equally sound is the Attorney General's reasoning that, Congress not taxing its wards on their restricted land, neither has it taxed the wards on their rentals therefrom. *Pollock v. Trust Company,* 157 U. S. 429; and 158 U. S. 601, 618; *Gillespie v. Oklahoma,* 257 U. S. 501, at 505; and *Oahu Ry. & Land Co. v. Pratt,* 14 Hawaii 126, 129.

Oil in place is, of course, land. *Marshall v. Mellon,* 179 Pa. 371, 374; and Indian "restrictions" are impersonal, they run with the land which it is the Government's duty to preserve against alienation. *Bowling v. United States,* 233 U. S. 528, 535; *United States v. Moore,* (C. C. A., 8th Cir.), 284 Fed. 86, 90.

Likewise, on Jun. 24, 1926, the Attorney General advised that an intent to tax the income of the members of the Hopi Tribe "can not be assumed from the general provisions of the internal revenue laws, although broad in compass", that individual Indians maintaining their tribal connections do not come *"within the purview* of the Federal revenue Acts".

It is *not* "exemption", it is "purview"!

Recurring to the prior opinions concerning the federal policy toward Indian wards in the matter of taxation, and how the "Indians have always been the subject of *special* legislation"—just as with the Osages (R. 3 to 5)—"and that *general* legislation, *and especially revenue laws,* which burden and restrict the use and enjoyment of property, should not be applied to Indian wards unless Congress clearly so directs",—the Attorney General said of the Acts in question:

> "The principles announced in these opinions are especially applicable to the Indians here involved. *These Indians are yet wards of the Nation,* in a condition of pupilage or dependency from which they have not been discharged. The *legal* title to the lands they occupy rests not in them, either individually or as a tribe, but *in the United States.* Appropriations are annually made for the protection, welfare, education, and civic advancement of these dependent people. * * * *To tax them is so inconsistent* with the purpose and object of the Government in its dealings with these Indians, and *the relation that it maintains toward them and their property,* that it can not be assumed from the general provisions of the internal revenue laws, although broad in compass, that such was the intention of Congress." (Italics ours.)
>
> 35 Op. Atty. Gen. 107, 108, 109.

3.

As to the matter of statutory *form,* as expressive of Congressional intent,—

With respect to any subject, Congress, having deliberately dealt with it *specially,* is presumed not to call it to mind in a later *general* Act where not expressly mentioned. *Rodgers v. United States,* 185 U. S. 83, 87, 88 and 89.

Indian status is peculiarly within the foregoing principle. And "generality" of terms of the present Revenue Acts, as to income of "every individual" from "any source", is not one whit more sweeping than in the statutes in the following two cases, which, even though there "literally" embracing Indians, were adjudged not to be *meant* to include them:

In *Washington v. Miller,* 235 U. S. 422, 427, Congress, having dealt specially in and by two certain provisos with respect to the Creek Nation, enacted a general law that "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation, so as to embrace *all* persons and estates in said Territory, whether *Indian,* freedmen, or otherwise, * * *".

This Court nevertheless held the special Acts unaffected, and said,—

> "No repealing clause accompanied this provision, so the question is, did it repeal the provisos by implication. There is no doubt that, *if taken literally,* it would subject the Creek lands to the Arkansas law of descent and distribution without any qualification or restriction. But this would be only by reason of the generality of its terms, *for it made no mention of that law or of those lands.* In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks." (Italics ours).

In *Frost v. Wenie,* 157 U. S. 46, 58, and 59, this Court had to do with a special Act protecting Osage trust and reserve lands in a certain reservation. Though the *words* of a later general Act, *literally,* embraced *all* lands in the reservation, the correct interpretation was,

that "Congress did not intend" by the later general Act to prescribe for the Osage trust lands within "all the lands"—that the correct interpretation of the general Act left "untouched the prior act as expressing the will of Congress in respect of the Osage trust and diminished reserve lands."

The opposing view, that by a general Revenue Act a tax on "every individual" reaches the members of an Indian Nation on their rentals from their specially immune land, also assumes an intention to depart from an unbroken policy to the contrary running back to the foundation of the Government and disregards settled rules of interpretation.

The United States never having for its own benefit in anywise taxed its Indian wards, any purpose now to make a radical departure "is not lightly to be inferred". *United States v. Nice,* 241 U. S. 591, 599.

Statutes levying taxes are construed (a) in favor of the Indians and (b) against the Government and (c) are not extended by implication. *United States v. Payne,* 264 U. S. 446; *Choate v. Trapp,* 224 U. S. 665, 675, *supra; United States v. Field,* 255 U. S. 257, 262; *Gould v. Gould,* 245 U. S. 151, 153.

Not only on principle and authority is intent to tax its wards in anywise not to be imputed to Congress by implication from general Acts, but—since the filing of the petition,—

V.

It has been conceded by the Government that Congress has not taxed the Osages on their oil royalties.

In the (unreported) case of *Pearson v. Alexander, Collector* (3356 Law, United States District Court, Western District of Oklahoma), Judge Cotteral, on Feb. 2, 1927, entered a final judgment in favor of October Pearson, an individual member of the Osage Tribe, adjudging that he had been erroneously taxed under the federal Revenue Acts "on his distributive share of the funds accruing during that year (1918) to the Osage Tribe of Indians from oil and gas mineral leases belonging to said tribe." (Pearson's petition, demurred to).

The time for review expired May 2, 1927, without step to that end, the Solicitor General declining to authorize an application for a writ of error, the case presenting the same question as dealt with by the Attorney General in his opinion *supra* relating to taxation of income of the Quapaw Indians.

Thus the Government now concedes that Congress has *not* by these Revenue Acts taxed its Osage wards on their income from these oil deposits *in their hands*—it being perceived that the duty owed the Indians precludes imputing to Congress any intent to take in federal taxes a part of the Indians' share of the oil *after* it reaches them,—and this without any "exemption" in the Acts.

The compelling reason—for the concession—that the Government has not, in general Acts that do not mention them, taxed a dependent people who are its wards upon their oil income in their hands is equally compelling that

Congress by these Acts has not taxed its wards thereon *at all.*

To take the tax out of the Osages' income in advance, *before* it reaches them, by reducing their royalty in the negotiations for the lease through taxation of their lessee, would be just as much taxing them. Indeed, from the very uncertainty to a bargaining lessee of the consequences of taxation of *prospective* profits from his share of an uncertain producton in a hazardous enterprise, the Government might well be taking more from the Indians by that method of taxation.

To say that Congress has not taxed its wards but has taxed their lessees, is to embrace form for substance, is not to look below the surface. When one faces "real nature and effect" and deals with the realities,—then to tax operator *is* to tax Indian. It is the same thing in another way.

What the Bureau of Internal Revenue really seeks, as touching Indian minerals, is to get the United States to shut its eyes to the facts so as thereby to effect a departure from that most just Indian policy to which the Government has for over one hundred and twenty-five years scrupulously adhered.

TWO.

The Government's mode of approach to the one and only question in this case appears to us to obscure it,—

(a) It is no mere matter of lessee-income from subsequent sale of oil (thought of as extracted and transmuted into *personalty*) being exempt under the

Acts, but of the effect on the *Indians'* income of announcing the taxation of their lessee before the lease is ever signed and while the oil is still down in the ground;

(b) Neither is there any question about an "exemption" in the Acts or of reading one into them. The correct view, and only claim, is, that Indian wards and their specially restricted property are *wholly outside the purview* of their Guardian's general tax Acts; and that, because of the inevitable effect upon the Indians' revenue of taxing their lessee, the income of the latter derived by contract with them is for like reason outside the law; and

(c) As has been seen, so far as this *particular* lessee is concerned (whom the Government's Brief so irrelevantly stresses), he made due objection from the outstart, returned the income on Government demand, paid under protest, and duly claimed refund, his Osage lessor receiving from him the high, unabated royalty;

Braden's "ignorance of his legal rights" (Government's Brief p. 9) had nothing whatever to do with his liability to pay, or the Treasury's right to assess and collect, the taxes. The right referred to is Braden's *right to refuse to include in his return* what the Treasury was "erroneously" requiring to be "included" (R. 10). Braden's "ignorance" was of this right, to refuse the return thus demanded of him, and it is in this connection that his Executor, after Braden's death, makes the averment (R. 13) which the Government cites. That this is the executor's meaning, is seen from the context and from Braden's denials of liability to tax duly averred.

Turning to the details of the Government's Brief,—

VI.

The interpretation of the Acts is not to be changed because of a particular lease having been signed.

Driven by the decisions and the opinions of the Attorneys General, petitioners not only concede that the Indians have *not* been taxed on their income from their restricted mineral lands, but, *sub silentio,* that the effect of the interpretation of the Revenue Acts sought by the Bureau of Internal Revenue would be to tax the Indians on all royalty they would *hereafter* get on their oil and gas and coal and ore, but in their Brief petitioners in effect argue—and in spite of this particular operator's having in fact made no deduction for taxes—yet that, Braden having once bound himself, no *subsequent taking* of taxes from him could abate the royalty of his covenant to pay by their *now* being shifted to the Tribe. But,—the answer, of course, is,—

(a)

These cases concern, not the obligation of a lease, but the scope of legislation.

It is not how a contract, once entered into, binds, but what the Congress, in relation to any lessee of dependent Indians, meant by its Acts.

They are the same Acts,—the scope for tomorrow was the scope from 1916 on; and

(b)

Neither is it a matter of *taking* taxes after a contract of lease has been signed, but of their promulgation during its negotiation:

Gillespie had made *his* contract, was bound when demand for taxes was made of him—like Braden had in hand income from his share of oil extracted as lessee of the Osages.

The "direct hamper" is before signing, is on effort to make "terms", and, of course, is in respect of the negotiations with *any* lessee.

VII.

There is no attempt here to read an exemption into the Revenue Acts. The question is one of scope of intent with reference to Indian wards.

In their opinions, neither Attorneys General nor courts below have read any exemption into the Revenue Acts:

They alike hold that the members of a dependent Tribe and their specially restricted property are in nowise within the *purview* of general tax Acts, are outside Congress' intent to tax—a very different thing from generality of statutory terms including a subject and its then being by an exemption taken out of their operation.

The issue is not and never was one of searching in the Acts for an exemption or of implying one into them. No such claim is made, or ever was made. The inquiry has always been whether Congress has enacted that certain income is *taxed,* not whether it has "exempted" it.

In spite, then, of the discussion permeating petitioners' Brief,—

> No one has read an exemption into the statutes. Were no exemptions enumerated therein at all, the proposition would be the same.
>
> This Tribe and its restricted property, already specially "exempt", Congress did not in anywise mean to *include*.

Bank v. Tennessee, 161 U. S. 134, 135, 145, and 146, (Petitioners' Brief, p. 11) was a case of interpreting an express provision of a State bank's charter exempting its capital stock from taxation. The State later taxed surplus. The bank's claim that the exemption also embraced surplus was rejected because the terms of the exemption did not plainly include surplus. At bar, there is no exemption to construe.

Moreover, by not appealing the Pearson case and by adopting the Quapaw and Hopi opinions, the Government concedes that the question is *not* one of an "exemption." These Acts contain no exemption in favor of the Indians, nor mention them, yet it is conceded *they* are not taxed. Hence, confessedly, "exemption" is not in this case. *Braden's* freedom is because he is the Osages' lessee.

Restating the problem, it is fundamentally the *Indians'* income that is "exempt"—to adopt Bureau terminology—and, at that, specially, and by treaties (R. 3, 4)—such that the burden is on the Government, it seems to us, to point out wherein Congress has in any manner taxed them; and, in consequence thereof, the income of the Indians' lessee in the premises Congress *has not taxed*. In that sense, the latter's income might be characterized as exempt, but that does not mean that anybody has found an exemption in the Acts or implied one into them.

As "exempt" means both "not subject to" and "excepted from the operation of", using "exempt" and "exempted" leads merely to confusion of thought. Notably enough, petitioners, when not treating of the lessee, use different terminology.

VIII.

The importance of the case to the Government is not denied, although the amount of other possible refunds is germane neither to the question of the Revenue Bureau's authority to collect such taxes nor the Treasury's right to retain them, not to mention the Bureau's having exacted the taxes against the advice and decisions *supra*.

Petitioners' suggestion, that Congress' reenactments of the law reflect the opinion of the Treasury, wholly forgets about the Attorney General. While Congress was engaged in its reenactments and the Treasury was forcing the Indians to pay, the Attorney General was advising that under the Acts the Indians had not been taxed. *Now* the Treasury confesses that the Attorney General was right.

In this matter, then, of insight into the mind of the legislature, which Department—do petitioners suggest—Congress in its reenactments was following?

The true view it seems to us is that, Indian wards and their specially restricted estate being outside the field of general taxation, there was no occasion for Congress ever in anywise to mention or deal with them in general tax Acts.

The case, therefore, comes down to this: Congress concededly not having taxed its Indian wards,—in all reality, is it not the same thing as taxing them to tax their min-

eral lessee? Is there anything better settled or better known than the doctrine of the incidence and shifting of taxation from lessee to landlord? Virtually petitioners' whole argument consists in persistently ignoring these basic things, as well as in ignoring the essential difference between a subject's being outside an Act's scope and an exemption from the operation of its terms.

As to the suggestion that the Bureau for years has been taxing the Indians' mineral lessees—and *the Indians also,* now confessedly illegally as to the Indians themselves—we beg to point out that our case dragged for years in the Treasury and from a date long before Braden died and that these suits were promptly brought after the Bureau was got to act. Till refund is denied, one can not sue.

As, then, solicitude was not for Gillespie, but was for Indians, so it is a matter here of the consequences to them of the interpretation urged by petitioners. On principle and the sole underlying reason in the Gillespie and related cases, the direct effect of promulgating taxation of the operators would be to lessen the income that can be negotiated for Indian coal, ore, gas, and oil. Since, then, the Guardian in its general tax Acts has not for its own benefit imposed a tax upon its wards—concededly has not—it has not wrought the same result by taxing their mineral lessees. Congress could not by mere implication from general Acts have meant to do so.

It is submitted,—

That the questions presented by the pleadings have been correctly and justly decided and that the judgments should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
R. C. ALLEN,
C. A. JONES,
M. W. ACHESON, JR.,
Attorneys for Respondent.

Of Counsel:
JAMES R. STERRETT,
I. J. UNDERWOOD.

[redacted]

TABLE OF CASES.

PAGE

Cherokee Nation *v.* Georgia, 5 Peters 1 ..... 2, 3, 4, 22
Church of the Holy Trinity *v.* United States, 143 U. S. 457 9
Choate *v.* Trapp, 224 U. S. 665, 675 ..... 16, 20, 21
Central of Georgia Ry. Co. *v.* Wright, 248 U. S. 525, 527 20

Dick *v.* United States, 208 U. S. 340 2

Elk *v.* Wilkins, 112 U. S. 95 ..... 3, 17

Fink *v.* Commissioners, 248 U. S. 399 ..... 20, 21

Gillespie *v.* Oklahoma, 257 U. S. 501..... 6, 12, 13, 14 16, 18, 22
Gould *v.* Gould, 245, U. S. 151, 153 21

In re: Sah-quah, 31 Fed. 329 ..... 3, 4

Jackson *v.* Goodell, 20 Johna, 193 4
Jaybird Mining Co. *v.* Weir, 271 U. S. 609 13

Kappler's Laws and Treaties, Vol. 2, p. 95... 23, 24, 25

McCullough *v.* Maryland 11

Thomas *v.* Gay, 169 U. S. 264 16

United States *v.* Barnady, 31 Fed. 20 3
United States *v.* Delaware & Hudson Company, (213 U. S. 366) 10
United States *v.* Holliday, 70 U. S. 418 2
United States *v.* Kagama, 118 U. S. 375 2
United States *v.* Kirby, 7 Wallace, 482 8
United States *v.* Lariviere, 93 U. S. 192 ..... 2, 3
United States *v.* Rickert, 188 U. S. 432 2

Washington *v.* Miller, 235 U. S. 422, 428 17
Worcester *v.* Georgia, 6 Peters, 515 ..... 2, 3
Wright *v.* Central of Georgia Ry. Co., 236 U. S. 674, 679, 680 19

IN THE

Supreme Court of the United States

OCTOBER TERM—1927.

Nos. 219-220.

D. B. HEINER, Collector of Internal Revenue for the Twenty-third District of Pensylvania,

Petitioner,

vs.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, deceased,

---

C. G. LEWELLYN, Former Collector of Internal Revenue for the Twenty-third District of Pennsylvania,

Petitioner,

vs.

THE COLONIAL TRUST COMPANY, Executor of the Will of Glenn T. Braden, deceased,

---

Brief of James M. Beck and T. J. Leahy as *Amici Curiae* in Behalf of the Osage Indian Tribe.

A brief as *amicus curiae,* filed by the courtesy of the Court and the parties to the record, need not and should not make a fresh recital of the facts. The *amicus curiae* need only submit such special considerations and additional reasons, as may possibly aid the Court in its consideration of the case.

I.

There is a special reason for such a brief in this case, for the Osage Indian Tribe, whom we represent, have a very direct and substantial interest in its decision. To determine the question without reference to its rights would be to produce the tragedy of "Hamlet" without Hamlet. As hereafter explained, the burden of such a tax, as applied to the share of royalties of an operating lessee, would inevitably lessen the value of the lands to the Indian Tribe. Every one knows that a tax exempt security sells to better advantage in the market than a taxable security. It is for this reason that nearly twenty billions of dollars are invested in tax free securities, which yield a low rate of interest. This is equally true of the leases under consideration. Who can seriously question that the Indian Tribe can secure a greater value for their property, if they can dispose of its mineral wealth free from any burden of taxation, direct or indirect?

The Constitution of the United States regards Indian tribes as a distinct entity. It provides that *"Congress shall have power to regulate commerce between the states, with foreign nations, and Indian tribes."*

These tribes have been repeatedly held by various decisions of this Court to be a semi-dependent political body, with certain rights to govern themselves, and to control their internal affairs, unless the same is taken away from them by Acts of Congress or by treaty.

Cherokee Nation v. *Georgia,* 5 Peters 1;
Worcester v. *Georgia,* 6 Peters 515;
United States v. *Kagama,* 118 U. S. 375;
United States v. *Rickert,* 188 U. S. 432;
United States v. *Holliday,* 70 U. S. 418;
Dick v. *United States,* 208 U. S. 340;
United States v. *Lariviere,* 93 U. S. 192;

Elk v. *Wilkins,* 112 U. S. 95;
In re: *Sah-quah,* 31 Fed. 329;
United States v. *Barnady,* 31 Fed. 20.

In *Cherokee Nation* v. *Georgia, supra,* Chief Justice Marshall, referring to the clause in the Constitution giving Congress power to regulate commerce with the Indian tribes, said:

> "In this clause they are as clearly contra-distinguished by a name appropriate to themselves from foreign nations as from the several states composing the union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be in fair construction applied to them. The objects to which the power of regulating commerce might be directed, are divided into three distinct classes—foreign nations, the several states, and Indian tribes. When forming this article, the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption."

In the case of *United States* v. *Lariviere, supra,* the court said:

> "From the commencement of the Government the United States has negotiated with the Indians in their tribal condition as nations; dependent, it is true, but still capable of making treaties, and this was only following the practice of Great Britain before the Revolution. In *Worcester* v. *Georgia, supra,* the court said: The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having such definite and well understood meaning. We have

> applied them to the Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense."

In re Sah-quah, the court used the following language:

> "From the organization of the government to the present time, the various Indian tribes of the United States have been treated as free and independent within their respective territories, governed by their respective tribal laws and customs, in all matters pertaining to their internal affairs, such as contracts, and the manner of their enforcement, marriage, descents, and the punishments for crimes committed against each other. They have been excused from all allegiance to the municipal laws of the whites as precedents or otherwise in relation to tribal affairs, subject, however, to such restraints as were from time to time deemed necessary for their own protection of the whites adjacent to them. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 16, 17; *Jackson* v. *Goodell,* 20 Johns, 193."

The details of the treaty relations between the United States and the Osage Tribe are fully stated in an appendix to his brief (*Post* p. 23).

II.

By these various treaties, the Osages without any substantial consideration other than the guaranty of the United States to protect the tribe, ceded vast tracts of land to the United States, comprising the greater part of the States of Missouri and Arkansas, a large part of Kansas, and a considerable portion of Oklahoma.

The United States can not now justly violate its trust obligation to this tribe. If the amount, which is

involved in this controversy be large (as suggested by the Solicitor General), the greater the injustice to the wards of the United States.

It is not questioned that if the Osage Indian Tribe had itself extracted the oil from the lands, or if the United States, as its trustee, had itself done so for the benefit of the Indians, that the United States would not diminish such property by taxation, and this notwithstanding general and sweeping expressions in the taxing statutes.

It seems equally indisputable that the United States, in pursuing this just and humane policy, never intended to do by indirection what it has consistently refrained from doing in terms.

It is equally clear, as a premise to the argument, that, if the United States as such trustee leased the lands in question for the extraction of that portion of the land which gave it its chief value, and which was subject to early exhaustion, any tax that might be imposed upon the lessee, in respect to his share of the profits would of necessity fall upon the owners of the land.

If the tax in question had been an infinitesimal one, it might be argued that this diminution of the lessee's share of the profits was too negligible to be a factor in the negotiations for the lease, but the Court will not forget that, due to the exigencies of a great war, the taxing statutes in question were burdensome almost to the point of confiscation. The taxes in question were both excess profit taxes and income taxes. In one of the taxing statutes in question the maximum surcharge on large incomes amounted to 70%. The excess profit taxes were correspondingly heavy.

It is, therefore, clear beyond controversy that the Osage Indian Tribe and the Interior Department could

make a better bargain for the Indians and obtain for them a much larger return for their property, if the royalties, which would accrue to the lessee, were not subject to diminution by taxation, for the more that the Government took, the less the lessee would give, and, as a result, the less the Government exacted, the more the Indians would receive.

Therefore, it is clear that it is the Indian Tribe, which must, in the last analysis, pay the taxes, and the only question in controversy is whether the Government intended to disregard its sacred duty to the tribe by abandoning its just and humane policy of non-taxation of Indian trust funds, simply because a portion of the proceeds was payable to the instrumentality, which the Government employed to extract the oil.

III.

Any argument on this point seems a superfluity, for this Court, as will be hereafter argued, in the case of *Gillespie* v. *Oklahoma*, 257 U. S. 501, clearly recognized that to burden a non-Indian lessee of Indian Tribal lands by a tax on his share of the royalties was to burden the owners of the land, and to "hamper" (such is the language of this Court) the Federal Government, as the trustee of the Indians, in the fulfillment of its trust to obtain the best terms for its wards. But how would it "hamper"? Not in the *power* to make such a lease, but clearly in the *ability*, if such a tax were imposed, to get the best results for the Indians and the full return for their property. Such was the clear meaning of the language of this Court.

To this argument the only reply of the Government is the very general language of the taxing statutes that "every individual" should pay the tax, excepting only those who are expressly excepted in the Act, and it

must be admitted that the statutes contain no express exception in behalf of the lessees of Indian property.

The inconsistency of this argument lies in the fact that the statutes contain no express exception in favor of the Indian owners, and yet the Government concedes that while "every individual" literally comprises the Indian inhabitants, yet such Indians are implied exceptions. Neither does it include the tribe which is the owner of the property, from which the income in question is derived.

An argument based upon such a general expression, especially in a taxing statute, is not likely to disturb this Court, for it has often recognized that it is impracticable in statutes to include in express language all of the exceptions. Language is at best an imperfect medium of thought. It generally suggests rather than defines, and it would be quite impracticable, without undue prolixity, for statutes to qualify general expressions by all of the exceptions, which may be fairly implied by reason of the Constitution, the recognized policies of the Nation and the provisions of other statutes.

In the practical administration of Government, the law making body must, and always does, assume that the judiciary will carry out the intent of the law-making body by such a reasonable interpretation as will take into account not merely the letter of the statute, but the scope of our Government, its existing and recognized policies, the purview of the statute, and the relationship of this statute to other statutes.

The judiciary, on the one hand, may reasonably assume that the Legislature did not contemplate any result which is either unreasonable, unjust or oppressive, or in marked conflict with its established policies, and upon the other hand, the Legislature may equally assume that the judiciary will construe language,

often necessarily general and sometimes vague, in a reasonable manner and in harmony with the character of our Government and its recognized policies.

IV.

"Every individual" is broad enough to include the officials and instrumentalities of the States, but the judiciary may well assume that Congress never intended to extend the statute to objects beyond its constitutional power, and again, if a special treaty is made, a general taxing statute is not presumed to abrogate such treaty.

"Every individual" means simply every individual within the purview of the statute, but such general legislation is not applied to a subject matter, which has been dealt with in special legislation, unless such a purpose is clearly indicated. As Endlich says in his "Interpretation of Statutes" (Section 25):

> "Language is rarely so free from ambiguity as to be incapable of being used in more than one sense; and to adhere rigidly to its literal and primary meaning in all cases would be to miss its real meaning in many. If a literal meaning had been given to the laws which forbade a layman to lay hands on a priest, and punished all who drew blood on the street, the layman who wounded a priest with a weapon would not have fallen within the prohibition, and the surgeon who bled a priest in the street to save his life would have been liable to punishment."

These familiar illustrations are cited in *U. S.* v. *Kirby,* 7 Wallace, 482, to exemplify the rule that,—

> "*The laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consquence. It will always*

> *therefore be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over the letter."*

No case better illustrates the error of a too rigid adherence to mere words than the leading case of the *Church of The Holy Trinity* v. *United States*, 143 U. S., 457, where Congress had passed a law containing a sweeping and unqualified prohibition of any assistance or encouragement to aliens to migrate to this country "to perform labor or services *of any kind* in the United States."

The question arose whether the migration under contract to this country of a clergyman to serve as pastor of Holy Trinity Church of New York City was a violation of this law. According to the literal signification of words, he was clearly within the provisions "to perform labor or services *of any kind* in the United States," and yet the Supreme Court held that the statute construed in the light of its manifest purposes did not apply to other than manual toilers. Mr. JUSTICE BREWER said:

> "*It must be conceded that the act of the corporation is within the letter of this section,* for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and services both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind," and further, as noticed by the Circuit Judge in his opinion, the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers, and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we

> cannot think Congress intended to denounce with penalties a transaction like that in the present case. *It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intentions of its makers. This has often been asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the Judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation or of the circumstances surrounding its enactment or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular case.*"

A notable and more recent illustration of this principle was the case of *United States* v. *Delaware & Hudson Company* (213 U. S. 366).

In that case the Commodity Clause of the Hepburn Law made it unlawful for a railroad to transport any commodity "manufactured, mined, or procured by it, or under its authority, *or* which it may own in whole, *or* in part, *or* in which it may have any interest direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

Literally the Act, with its disjunctive provisions, provided that a railroad could not transport any commodity, which it had manufactured, mined or produced, even though at the time of transportation it had ceased to have any interest in it. The question was whether the Act applied to coal, which had been mined by a railroad but sold by it before it had entered into transportation.

This Court, in an opinion by Chief Justice White, disregarded the literal force of the sweeping language of the Commodity Clause in order to harmonize it with the general policy of this and other statutes, which regulate interstate commerce, and also to avoid the decision of a grave constitutional question, to which the literal interpretation would have given rise.

But why elaborate the point? The books are full of cases where the literal meaning of statutory language is disregarded by reading into the statute exceptions, which the Court knows as matter of common sense the legislature intended. Such a rule of interpretation, without which the administration of justice would lead to the most absurd and oppressive results, has its classic illustration in the interpretation of the Constitution itself, for no language is more sweeping than the power given to the United States to tax, and such language, as in this case, is strengthened by its own express exceptions. When, therefore, this clause first came to be expounded, it might have seemed plausible to argue that, as the Constitution itself made its own exceptions, and otherwise seemingly gave an unlimited power to tax without reservation or qualification, no other exception could be made by implication.

The sound common sense and far sighted vision of Chief Justice Marshall swept away this narrow reasoning in *McCullough* v. *Maryland*, and the instrumentalities of the States were made, by judicial construction, exceptions to the Federal power of taxation in order to bring that sweeping power into harmony with the whole purpose of the Constitution. That was a far greater implication than the contention in this case, which simply argues that the general language of a taxing statute shall not be construed to apply to a situation which is manifestly beyond the purview of the statute, and which, if applied literally, would conflict

with the historic policy of the Nation to preserve, and not to diminish, directly or indirectly, the property of the Indians.

V.

But why extend the argument when this Court has in principle decided the question in the matter of the Osage Tribal lands? Even if the main issue in *Gillespie* v. *Oklahoma* raised a different question of constitutional power, yet the underlying question was whether a tax upon a non-Indian lessee of Indian oil lands was or was not a burden upon the property of the Indians. This Court reached the conclusion that it was such a burden and therefore invalid. If it had not burdened the property of the Indians and "hampered" the Federal Government in the performance of its duties as trustee, the State of Oklahoma would have had full power to tax property within its territory.

To invalidate the State statute, it was first necessary to assume that the State tax was a burden upon the lease and would necessarily affect its terms to the prejudice of the Indians, and would "hamper" the United States as trustee in preventing it from getting the best terms for its Indian wards.

We shall argue that every contention now urged by the Government to the contrary was equally urged in the *Gillespie* case and, after due consideration, negatived by this Court. Unless, therefore, this Court is prepared to abandon its reasoning in the *Gillespie* case and to destroy the foundation upon which that decision was rested, it must equally hold—even though the question of Governmental *power* is not at issue—that the United States did not intend, by a general taxing statute, to diminish for its own benefit, the property of its wards.

It has been held that the language of the income tax laws, notwithstanding the broad terms used, does not include within its scope taxes on the restricted tribal lands of the Indians or the income thereof derived by the Indians. (Opinions of Atty Gen., Vol. 34, pp. 272, 439; Vol. 35, p. 107).

It is further conceded, as we understand it and as is settled by the decisions of this Court, that such tribal lands of the Indians are exempt from state taxation, and this rule has been extended to a lessee of such lands under authority of the Government, and thus carries with it an exemption of the income of such lessee, the immediate source of which is the lease arranged by the Government. (*Gillespie* v. *Oklahoma,* 257 U. S. 501; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609.)

But it is contended by the Government that the exclusion from federal taxation of the restricted tribal lands, and the income thereof derived by the Indian tribe, does not carry with it an exclusion of the lessee's share of the royalties.

No reason, however, is given in the one case (of Federal Income Taxes) which is not equally applicable to the other case (of State Income Taxes). Neither government will tax the property of the other "and from the nature of the case neither government will lay taxes upon its own property." 37 *Cyc.* 865.

Our proposition, therefore, is that the reasoning in *Gillespie* v. *Oklahoma, supra,* which impelled this Court to hold that a lessee of Indian tribal lands is exempt from *State* taxation of the income from such lands, determines the question as to the extent of the exemption *intended* by Congress in the *Federal* Income Tax statutes, by excluding them from the purview of the tax laws.

An analysis of the argument for the Government in the *Gillespie* case will, we believe, demonstrate this.

It is said that the income of the lessee is too remote to be included in the exemption of the lands; that it is a case of "the house that Jack built." But it does not appear why the "remoteness" of the lessee's income from the land itself, is any greater or less in the one case than in the other. Indeed, precisely the same argument, in substantially the same form, was made to this Court in *Gillespie* v. *Oklahoma*, where counsel for Oklahoma argued:

> "It is going far afield for courts to hold that to tax the lessee of a restricted Indian leasehold upon his share of gross production of oil and gas, or other mineral, is indirectly taxing the exercise of a federal agency, and is, therefore, invalid; but to go a step farther and say that to require such lessee to include in his income tax returns net income derived from such source imposes a like burden, would be carrying the idea of guardianship into too remote a channel to meet the practical application of taxing laws."

But this Court answered that it was not too remote and that where the land, itself, is immune, "an inquiry is allowed into the sources from which net income is derived, and if part of it comes from such a source, the tax is *pro tanto* void."

Again, it is now argued by the Government that a tax on the income of the lessee, in reality and as a practical matter, does not throw any burden on the Indian land and that leasing contracts for rents or royalties are not influenced by any consideration of taxes.

The same argument was unsuccessfully made by counsel for the State of Oklahoma with reference to State taxation in *Gillespie* v. *Oklahoma, supra*, as follows:

> "The theory upon which such contention is made is that such a tax would have a deteriorat-

> ing influence upon the purchasers of Indian leases. * * * To hold the tax a burden upon the lease would be to repudiate the entire scheme of net income taxation; that is, the net income regarded as a taxable subject-matter severed from its source."

This argument was answered by this Court:

> "The same considerations that invalidate a tax upon the leases invalidate a tax upon the profit of the leases. * * *"

and again:

> *"The tax upon the leases is a tax upon the power to make them and could be used to destroy the power to make them."*

It is true that in the State tax cases the question of the effect of the tax on the lessor was discussed and decided in litigation that also involved the *power* to tax, whereas in the case at bar the question is one of *intent* and not of *power*. But a lease is a lease, whether looked at by State officers or Federal officers. A burden that is remote and one that is direct are not matters peculiar to State law or to Federal law, but are common to both.

If a tax on the income is a tax on the source, it is equally so, whether the tax be federal, state, territorial, county or city. The nature and effect of the tax is not changed because the taxing authorities can not, but do, tax in one instance, and do not, but could, tax in the other instance.

The real question is, what does an exemption, whether created by lack of power, or non-inclusion, of Indian land from taxation include? Does it include the income of the lands exempt from taxation? Does it exempt the income so received by a non-Indian lessee, when he

is an instrumentality of the United States in discharging a sacred trust?

All these questions have been settled by this Court. (*Gillespie* v. *Oklahoma*, 257 U. S. p. 501; *Thomas* v. *Gay*, 169 U. S. 264.) In these two cases (and the cases cited in them and the cases following them) this Court has pointed out what is "direct" and what is "too remote."

If, because the tribal lands of the Osage Indians, for whom the United States acts as trustee, are not within the purview of the income tax statutes, Congress has effectively exempted them from taxation, that exemption is as effective as if Congress had exempted the Indian lands by treaty with the Indians and, recognizing the paramount authority of the treaty (unless expressly repealed), had disclaimed an intention to repeal it.

Indeed, the reasons for exemption in the present case are stronger than those for exemption in the State cases. In the State cases, since they involve questions of constitutional power, there would be invoked the rule of resolving doubt in favor of the power and this principle would in the instant case conflict with another policy, that in dealings with the Indians, doubt is to be resolved in favor of the Indians and not against them. In the present case only the latter policy is involved as an aid to interpretation. That this rule of construction applies as between the Indians and the United States and that it applies in tax cases, is now well settled. In *Choate* v. *Trapp*, 224 U. S., 665, 675, this Court said:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved

> in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases."

VI.

The exemption of the Indian lands from Federal taxation grows out of treaty relations between the United States and the Indians. These treaties are the supreme law of the land. They supersede all prior acts of Congress. No repeal is inferred from general statutes. Ordinarily a repeal must be express and specific. Until this is done, the treaty remains the supreme law. Such repeals are never favored. A breach of good faith is not lightly imputed to Congress.

Such being the case, it is not to be presumed that Congress, by enacting a general tax law, intended to repeal a treaty or to modify it in any particular. A conflict between a special treaty and a general law is to be avoided, if any reasonable interpretation will avoid it. In construing the language of Congress, it may properly be assumed that Congress did not intend a gross breach of faith.

These considerations have given rise to the settled rule that general statutes of Congress are not to be taken as applying to the Indian tribal lands, unless it appears that the attention of Congress must have been particularly directed to the prior specific laws or treaties protecting the Indians. *Washington* v. *Miller*, 235 U. S. 422, 428.

The doctrine of *Elk* v. *Wilkins*, 112 U. S. 94, has never been questioned:

> "The Indian Tribes, being within the territorial limits of the United States, were not, strictly

> speaking, foreign States; but they were alien Nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either through treaties made by the President and Senate, or through Act of Congress in the ordinary forms of legislation. The members of those Tribes owed immediate allegiance to their several Tribes and were not part of the people of the United States. They were in a dependent condition, a state of pupilage, resembling that of a ward to his guardian. Indians and their property, exempt from taxation by treaty or statute of the United States, could not be taxed by any State. *General Acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them.*"

The principles of interpretation, therefore, have logically the same basis in this case that they would have if Congress actually was without power to modify a treaty, or to take or burden the tribal property of the Indians. This consideration leads inevitably to the conclusion that there is no sound basis for the suggestion that the extent of exemption from State taxation (because of lack of State power to tax) must be founded on different principles than those applying to and determining the extent of an exemption from Federal tax (because not within the purview of the taxing statute).

If a different and narrower view is taken of *Gillespie* v. *Oklahoma, supra,* and it is considered as concerned solely with the proposition that the lessee of Indian land is an instrumentality of the Federal Government, which cannot be interfered with by the State, the result, so far as interpretation of the Federal income tax law is concerned, is the same. The question then would be whether the reasoning, denying the right to tax a

Federal instrumentality, should be applied in interpreting the intent of Congress to tax its own instrumentality.

Is not the question of the extent of the power to tax (which after all is determined by finding the intent in constitutional provisions and laws of Congress granting or withholding the power to tax) substantially the same as the extent of the authority to tax actually given or withheld by the laws of Congress, which is to be deduced from the presumed intent of Congress in the use of general language in the tax laws?

The contention of the Government as to the proper construction of the Federal tax law, as distinguished from the proper construction of the Constitution and laws governing the power of the States, would lead, if carried to a logical conclusion, to an absurdity. It would be that from the general language in the Federal Income Tax Statutes, taken in connection with the solemn promises to and treaties with the Indian tribes, we find a clear intent of Congress not to burden Indian oil lands at all by taxing the land or the income derived by the Indians, but that we must further read into the Income Tax law a limitation upon this clear intent by which the Government can reach and appropriate to itself part of the income from the Indian oil lands, if it arranges for their development by means of an instrumentality of its own, and divides with that instrumentality a part of the income. Of a somewhat similar argument on construction of legislative intent, this Court said (*Wright* v. *Central of Georgia Ry. Co.*, 236 U. S. 674, 679, 680):

> "We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain

> by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor."

And in *Central of Georgia Ry.* v. *Wright*, 248 U. S. 525, 527, this Court said:

> "The taxes now attempted to be levied are upon the *leasehold interests of the lessee* in the same roads and it is argued that, if the leases produce a profit in excess of the rental, the value is required to be taxed by the constitution of the State. But the constitution was subsequent to the charters that created the exemption and must yield to them if they apply to the present attempt. We are of opinion that although the decision in the former case necessarily was confined to the question before the Court, *the reasoning applies with equal force to that now before us.*"

VII.

We invoke the principles as to the nature and extent of the tax exemption of the Indian land to be found in *Choate* v. *Trapp, supra*, taken in connection with *Fink* v. *Commissioners*, 248 U. S. 399.

From these cases it is clear that as long as the value to the Indians is the land itself (and prior to alienation, whereby *money* is substituted for the lands) any use made of the lands, by which their worth is realized, necessarily carries with it that tax exemption, which will give full and complete effect to the exemption of the lands themselves; and it is only when the lands are alienated (and all rights of the Indian are exchanged for other property) and passes to another, *on express condition that the tax exemption is to be lost and the lands are to be taxed in the hands of the purchaser*, that the exemption from taxation is to be affected or diminished.

In *Fink* v. *Commissioners* this Court, referring to *Choate* v. *Trapp*, said: "In that case the State of Oklahoma undertook to tax lands which were *yet in the hands of the Indians*," and the court answered that the "provision exempting from taxation was a property right," but that in the *Fink* case it would invade no right of the Indian "to make the alienation of the land a surrender of the exemption from taxation."

It must follow logically from the reasoning of the court that while the lands are yet in the hands of the Indians and before alienation and surrender of the lands themselves, the exploitation of the lands, to realize their value, could not be made a surrender of tax exemption, if the tax exemption of the lands themselves is to be preserved.

VIII.

The instant case involves only a question of the interpretation of tax laws, the fundamental rule for which is that tax statutes are, in case of doubt, "construed most strongly against the Government and in favor of the citizen," (*Gould* v. *Gould*, 245 U. S. 151, 153) and this is especially true in interpreting the Government's dealings with Indian lands. (*Choate* v. *Trapp*, 234 U. S. 665.)

Having in view the settled policy of the United States towards the Indians for more than a hundred years, the dealings with them in the form of treaties, and the guardianship relation by which the oil lands are held by the Government for the benefit of the tribes, do the laws of the United States, by the "clear import of the language used" (*Gould* v. *Gould*, *supra*) mean to exclude the Indian mineral lands from all taxation, State and Federal, direct or indirect, on the one hand, and on the other hand inconsistently authorize the Gov-

ernment to collect for itself a tax on the income of a lessee of such lands, the terms of whose lease were arranged by the Government itself in performance of its guardianship, although such a tax collected by a State would be taxing an instrumentality of the Government, would be burdening the land itself and would be a direct "hamper" on the Government in making advantageous terms for the Indians?

That is the question, as we conceive it, which is presented to this Court, and which this Court has already answered in the negative in *Gillespie* v. *Oklahoma, supra.*

On the authority of that decision, the question was also answered in the negative by both the District Court and the Circuit Court of Appeals. Their able opinions show that in any view the application of these laws to the income of a lessee is doubtful and as such should be resolved in favor of the Indian Tribes, for upon them the burden of the tax inevitably falls. Such being the case, this Court may well recall the language of Chief Justice Marshall in *Cherokee Nation* v. *Georgia, supra*:

> *"They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."*

Respectfully submitted,

JAMES M. BECK,
T. J. LEAHY,
As Amici Curiae.

APPENDIX.

Prior to the Louisiana Purchase the Osage tribe of Indians was under the jurisdiction of France, but by reason of that purchase they became subjects of the United States. On November 10, 1808, the United States entered into a treaty with the Osage tribe of Indians, in which it recognized the tribe as a political entity of such nature as entitled it to enter into treaty relations with the United States. (*Kappler's Laws and Treaties*, Vol. 2, p. 95.) As pertinent to this proposition, article 6 of said treaty provides:

> "Art. 6. And in consideration of the advantages which we derive from the stipulations contained in the foregoing articles, we, the chiefs and warriors of the Great and Little Osage, for ourselves and our nations respectively, covenant and agree with the United States, that the boundary lines between our nations and the United States shall be as follows, to wit: Beginning at Fort Clark, on the Mississippi, five miles above Fire Prairie, and running thence a due south course to the Mississippi; hereby ceding and relinquishing forever to the United States, all the lands which lie east of the said line, and north of the southwardly bank of the Arkansas, and all the lands situated northwardly of the river Missouri. And we do further cede and relinquish to the United States forever, a tract of two leagues square, to embrace Fort Clark, and to be laid off in such manner as the President of the United States shall think proper."

And as further evidence that the United States recognized the Osage Nation as a political entity, article 10 of said treaty, provides:

> "Art. 10. The United States receives the Great and Little Osage nations into their friendship and under their protection; and the said

> nations, on their part, declare that they will consider themselves under the protection of no other power whatsoever; disclaiming all right to cede, sell, or in any manner transfer their lands to any foreign power, or to citizens of the United States, or to inhabitants of Louisiana, unless duly authorized by the President of the United States, to make the said purchase or make the said cession on behalf of the government."

Thus the United States took the Great and Little Osage Nations under its protection, thereby establishing in the beginning the relation between the Osage tribe and the United States of dependency and protection. In other words, this was the first step after the Louisiana purchase on the part of the United States to assume the position of guardian of the Osage tribe.

On September 12, 1815, after the close of the War of 1812, the United States again entered into a treaty with the Osage tribe of Indians, for the purpose of re-establishing peace and friendship between the United States and the said tribe of Indians. (*Kappler's Laws and Treaties,* Vol. 2, p. 119.) The preamble to said treaty reads as follows:

> "The parties being desirous of re-establishing peace and friendship between the United States and the said tribe or nations, and of being placed in all things, in every respect, on the same footing on which they stood before the war have agreed to the following articles."

And article 3 reads as follows:

> "Art. 3. The contracting parties, in the sincerity of mutual friendship recognize, re-establish, and confirm, all and every treaty, contract and agreement, heretofore concluded between the United States and the said Osage tribe or nations."

Again on September 25, 1818, a treaty was entered into between the Osage Nation and the United States, whereby the Osage Nation ceded certain lands to the United States, and the United States agreed upon certain boundary lines as being the boundary line between the land owned by the Osage tribe of Indians and the United States. (*Kappler's Laws and Treaties*, Vol. 2, p. 167.)

The treaty of June 2, 1825 (*Kappler's Laws and Treaties*, Vol. 2, p. 217), contains the preamble:

> "In order to more effectually extend to said Tribes that protection of the Government so much desired by them, it is agreed as follows:"

Then follows a treaty consisting of fourteen articles. In the fourteenth article is found the language:

> "These articles shall take effect, and become obligatory upon the contracting parties, as soon as the same shall be ratified by the President by and with the advice and consent of the senate of the United States."

On January 11, 1839 (*Kappler's Laws and Treaties*, Vol. 2, p. 525) the United States entered into a treaty with the Osage tribe of Indians, article 3 of which reads as follows:

> "This treaty shall be binding on both parties when ratified by the United States Senate."

On September 29, 1865 (*Kappler's Laws and Treaties*, Vol. 2, p. 878) another treaty was entered into between the United States and the Osage tribe of Indians, article 10 of which expresses the dependency of the Osages upon the United States, and reads as follows:

> "Art. 10. The Osages acknowledge their dependency on the Government of the United

> States, and invoke its protection and care; they desire peace, and promise to abstain from war, and commit no depredations on either citizens or Indians; and they further agree to use their best efforts to suppress the introduction of ardent spirits in their country."

Article 17 of the same treaty provides for ratification of the same in the following language:

> "Art. 17. Should the Senate reject or amend any of the above articles, such rejection or amendment shall not affect the other provisions of this treaty but the same shall go into effect when ratified by the Senate and approved by the President."

These treaties not only establish the proposition that the United States has at all times regarded the Osage tribe of Indians as a political entity, but also that the tribe is dependent upon the United States and the United States accepts that relation as a sacred trust.

On June 28, 1906, the Congress passed what is known as the Osage Allotment Act (34 Stat. L. 539). In this act Congress recognizes the Osage tribe of Indians as a political entity by authorizing the tribe to elect a principal chief, an assistant chief, and eight members of the tribal council, having the power and authority to look after the business interests of the tribe subject to the supervision of the United States.

Not only do the various decisions, treaties, and Acts of Congress mentioned above establish the trust relation between the United States and the Osage tribe of Indians, but the United States as a further evidence of such relationship received from the Cherokee Nation in trust for the Osage tribe a deed for the lands, from which it now receives its mineral rights and these same minerals are now held by the

United States under such trust deed. The same thereby became a federal agency, by which the United States has endeavored to carry out its obligations to the Osage tribe of Indians. These lands were purchased by the United States for the Osage tribe out of funds belonging to said tribe and held in trust by the United States.

It is specifically stated in said deed:

> "This indenture, made and entered into this fourteenth day of June, A. D., eighteen hundred and eighty-three, between the Cherokee Nation, by Dennis W. Bushyhead, principal chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Osage and Kansas Indians, of the second part, Witnesseth, that * * *.
>
> Whereas, by virtue of a provision in the Act of Congress of March third, eighteen hundred and seventy-three, there has been transferred from the proceeds of sale of Osage lands in Kansas, and placed to the credit of said Cherokee Nation the sum of one million, ninety-nine thousand, one hundred and thirty-seven and forty-one hundredths dollars ($1,099,137.41), in payment for said tract of land: * * *
>
> Therefore, by authority of an act of the National Council of the Cherokee Nation aforesaid, approved May eighth, eighteen hundred and eighty-three. * * *
>
> Said party of the first part, by the aforesaid principal chief, and delegates, and in consideration of the payment of the sum of money mentioned in the Act of March third, eighteen hundred and eighty-three, aforesaid, as due under appraisement for Cherokee lands west of the Arkansas river, and of the further sum paid under the Act of March third, eighteen hundred and seventy-three, as aforesaid, does by these

> presents bargain, sell, remise, release, relinquish and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians, all those certain tracts of land lying and being in the Indian Territory, embracing the following townships, and fractional townships, north and east of the Indian meridian. * * *."

Further evidencing the intention of the Government to retail control over the mineral resources of the tribe it is provided in the Act of Congress of June 28, 1906 (34 Stat. L., 539-543), as follows:

> "That the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth day of April, nineteen hundred and six; and leases for all oil, gas, and other minerals, covered by selection and division of land herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe: Provided, that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States; And provided further, that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; Provided, however, that nothing herein contained shall be construed as affecting any valid existing lease or contract."

This is the only form of alienation of these minerals possible under the law.